STATEMENT OF MICHAEL J. BEAN, COUNSELOR TO THE ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE, ON H.R. 4315, THE "21ST CENTURY ENDANGERED SPECIES TRANSPARENCY ACT;" H.R. 4316, THE "ENDANGERED SPECIES RECOVERY TRANSPARENCY ACT;" H.R. 4317, THE STATE, TRIBAL, AND LOCAL SPECIES TRANSPARENCY AND RECOVERY ACT;" AND H.R. 4318, THE "ENDANGERED SPECIES LITIGATION REASONABLENESS ACT."

April 8, 2014

Chairman Hastings, Ranking Member DeFazio, and Members of the Committee, I am Michael J. Bean, Counselor to the Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior (Department). I appreciate the opportunity to testify before you today regarding four bills to amend the Endangered Species Act of 1973 (ESA). Although the Department cannot support these four bills in their current form, the Service recognizes the importance of data transparency and availability and is willing to work with the Committee to address the issues that the bills raise.

Overview of the Endangered Species Act

The ESA provides a critical safety net for America's native fish, wildlife, and plants. And we know it can deliver remarkable successes. Since Congress passed this landmark conservation law in 1973, the ESA has prevented the extinction of hundreds of imperiled species across the nation and has promoted the recovery of many others – like the bald eagle, the very symbol of our Nation's strength.

Earlier this year, the Service published a proposal to recognize the recovery of, and to remove from the protection of the ESA, the Oregon chub, a fish native to rivers and streams in the State of Oregon. The recovery of the Oregon chub is noteworthy because it is attributable in significant part to the cooperation of private landowners who entered into voluntary conservation agreements to manage their lands in ways that would be helpful to this rare fish. In some cases, landowners agreed to cooperate in reintroducing the fish into suitable waters on their property. The help of private landowners and the cooperation of state and federal partners were critical to the success in bringing this fish to the point at which it is no longer endangered and no longer in need of the protection of the ESA.

The recovery of the Oregon chub has taken a little more than twenty years of sustained effort. That is a relatively speedy time frame within which to undo the effects of what are often many decades of habitat loss and degradation and the other threats that are responsible for the endangerment of many species. For example, the recovery and delisting of the bald eagle was the culmination of a 40-year conservation effort. The Aleutian Canada goose recovery took 34 years. Efforts to recover the whooping crane have been underway since the 1940's when fewer than 20 cranes remained. Those efforts have been dramatically successful, with a wild population today of several hundred birds. Likewise, the California condor and black-footed ferret, both of which were so perilously close to extinction that no individuals of either species survived in the wild, have made extraordinary progress. Today condors and ferrets have been

successfully bred in captivity and reintroduced to the wild, where they have successfully produced wild-born offspring. Despite the dramatic progress toward recovery that each of these species has made, the whooping crane, California condor and black-footed ferret are still endangered species and will likely remain so for many more years. That is the virtually inevitable consequence of waiting until a species has been greatly depleted before beginning efforts to recover it, as is the case for most species protected under the Endangered Species Act.

As the Oregon chub example makes clear, private landowners can hasten the recovery of endangered species through their cooperative efforts. The Oregon chub is just one of many endangered species that landowners are helping recover through voluntary agreements with the Service known as "safe harbor agreements." These agreements provide participating private property owners with land-use certainty in exchange for actions that contribute to the recovery of listed species on non-Federal lands. Safe harbor agreements with Texas ranch owners have helped restore the northern aplomado falcon to the United States, from which it had been absent for roughly a half century. In the southeastern United States, more than 400 landowners have enrolled nearly 2.5 million acres of their land in safe harbor agreements for the endangered red-cockaded woodpecker. These landowners have effectively laid out the welcome mat for this endangered bird on their land, as a result of which populations of this endangered bird are growing on many of these properties. Many others are doing similarly for other endangered species.

Thus, the Endangered Species Act provides great flexibility for landowners, states and counties to work with the Fish and Wildlife Service on voluntary agreements to protect habitat and conserve imperiled species. Through Safe Harbor Agreements, Candidate Conservation Agreements, Habitat Conservation Plans, Experimental Population authority, and the ability to modify the prohibitions on take of endangered species in Section 9 by crafting special rules for threatened species under Section4(d), the Act allows and encourages creative, collaborative, voluntary practices that can align landowner objectives with conservation goals.

H.R. 4315 and H.R. 4317: Data Quality and Accessibility

If enacted, H.R. 4315, the *21st Century Endangered Species Transparency Act*, would establish a requirement to make publically available on the internet the best scientific and commercial data that are the basis for each listing determination. If H.R. 4317 were enacted, the *State, Tribal, and Local Species Transparency and Recovery Act* would amend the ESA to require FWS provide states with all data used in ESA section 4(a) determinations prior to making its determination, and define "best available scientific and commercial data" to include all data submitted by a state, or tribal or county government.

"Best Available" Data

The decisions that the Fish and Wildlife Service makes with respect to listing or delisting of species must be made "solely on the basis of the best scientific and commercial data available." Congress added this explicit directive in 1982, in response to the perception that some listing decisions then were being influenced by non-scientific considerations. Congress made clear then that the threshold decision of whether a species is endangered or threatened is a scientific judgment to be informed by the best available information alone.

Often, the states are among the best sources of such information, particularly with respect to game and other actively managed species. However, some states lack authority or programs to conserve certain species that are eligible for protection under the Endangered Species Act, such as invertebrates and plants, and therefore collect insufficient data. Counties and other units of local government generally have neither jurisdiction nor programs to manage wildlife. For all of these reasons, the best available scientific information may come from such sources as universities, museums, conservation organizations, and industry. Thus, to define "best scientific and commercial data available" as always including data submitted by a state, tribal or county government – as HR 4317 does – may not always be accurate. Section 4(b)(1) of the Act already requires the Service to take into account the efforts and views of states and their political subdivisions when making listing decisions, and Section 4(i) requires the Service, if it makes a listing determination at odds with the recommendations of a state, to provide that state with a written explanation of the reasons for doing so. Finally, it should be noted that defining all data submitted by states or counties as the "best available," would create a quandary if there were conflicting data from such sources. A concrete recent example concerned several counties in Kansas who took strong exception to the conservation plan for the lesser prairie-chicken that the state proposed. The counties and the state took diametrically opposed positions based on conflicting data. In this example, both cannot be the "best available."

As noted, the studies, reports, and research publications by state agencies or their employees are often the best studies and analyses available to the Service. A broad-ranging requirement to post on the internet this state data – particularly if that requirement extends to the raw data underlying such studies and analyses – would almost certainly elicit a number of well-considered concerns from the states themselves. Those concerns would start with the fact that in some instances state law prohibits the release of certain wildlife data. For example, Texas Government Code Section 403.454 prohibits the disclosure of information that "relates to the specific location, species identification, or quantity of any animal or plant life" for which a conservation plan is in place or even under consideration.

Even where there is no state law barrier to releasing the raw data underlying state studies, there are many reasons why states would be reluctant to have that data widely disseminated via the internet. To the extent that such data reveals the location of rare or sensitive species, its disclosure would put such species at added risk, both from collectors or vandals as well as from people with entirely innocent motives, such as the desire to get an up-close photo of an eagle and its young in their nest, or of prairie-chickens displaying on their mating grounds.

The ability of states, and of scientific researchers generally, to gather wildlife data often depends upon the willingness of private landowners to grant them access to their lands. Many landowners can reasonably be expected to be less likely to grant such access if they know that the data collected on their land would be posted on the internet. Their concerns might include the well-being of the wildlife on their land as well as their own sense of privacy and desire not to have to contend with trespassers, vandals, and simple curiosity seekers. The disclosure requirement that the sponsors of HR 4315 intend to produce better scientific data could have the unintended consequence of reducing the amount and quality of such data. While the Service is willing to explore other approaches, it has generally found satisfactory to most states and researchers its current records management process. As part of that process, the Service makes available all of the relevant scientific and commercial data that it has and on which it relies in

making a listing determination under section 4(a)(1) of the ESA. The data is generally maintained at the field office that is the lead for making the listing determination. Additionally, a list of literature, studies, and other relevant data used in making the determination and copies of pivotal documents are posted on Regulations.Gov, the government web site for electronic records and public comments. These documents are generally made available to the public electronically upon request. However, there may be limitations to the release of certain data if it falls within one of the exceptions to disclosure under the Freedom of Information Act (for example, the Service sometimes obtains from the Defense Department certain high resolution photographs that the Department requests not be released to the public because of national defense considerations). In these cases, the Service refers the requester to the party from which the data originated. Further, in many circumstances, such as peer-review published literature, FWS relies on a synthesis or analysis of data that is summarized by the prevailing scientific expert or author of the paper. In such circumstances, FWS relies on the expert evaluation and analysis of the data and may not have in its possession or be able to obtain the underlying data.

H.R. 4316 and H.R. 4318: Litigation Reform

The *Endangered Species Recovery Transparency Act*, H.R. 4316, would require the Secretaries of the Interior and Commerce to provide an annual report to Congress detailing litigation expenditures from agencies within their respective Departments within 90 days of fiscal yearend. Agencies would need to provide the Secretary with detailed information, including a description of the claims; the amounts of resources expended responding to notices of intent to sue letters and all other actions in preparation of or related to litigation, as well as attorney's fees awarded and the basis for such awards. H.R. 4318, the *Endangered Species Litigation Reasonableness Act* would limit the hourly rate for prevailing attorney fees to $125 per hour, thereby focusing resources on conservation and recovery rather than litigation. In consultation with Department of Interior's Solicitor's Office, we find it is unclear whether the amendment as drafted would actually amend the ESA to place a cap on fees and awards and, even if it did, considering the complex interplay between the provisions of the Equal Access to Justice Act and the Endangered Species, whether doing so would have the intended effect.

The Service would like to explore with the Committee whether there are administratively easier means of tracking and reporting fee awards than what has been proposed.

Conclusion

In closing, Mr. Chairman, America's fish, wildlife, and plant resources belong to all Americans, and ensuring the health of imperiled species is a shared responsibility for all of us. In implementing the ESA, the Service endeavors to adhere rigorously to the congressional requirement that implementation of the law be based strictly on science. At the same time, the Service has been responsive to the need to develop flexible, innovative mechanisms to engage the cooperation of private landowners and others under the Endangered Species Act and other laws, both to preclude the need to list species where possible, and to speed the recovery of those species that are listed. The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery. Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.